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In the Supreme Court of the United States

DONALD WEEMS AND MICHAEL BRIGGS,
Petitioners,

v.

LAWRENCE JOHNSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Respondents are wrong to claim that Petitioners have a right to counsel. Petitioners are barred from bringing a lawyer to the assessment interview. Respondents' intimation that Petitioners can review the documents being used against them is also incorrect. In making an assessment, an interviewer may use documents whose contents not disclosed, nor the author identified.

Respondents' attempt to distinguish other states' procedures and case law affecting those procedures prove the point that there is a split of authority on what minimum procedural protections are due.

Respondents' allegation that Petitioners failed to raise "burden of proof" before the Eighth Circuit is incorrect and misses the point. There is no burden of proof in the Arkansas scheme, and that is one of the reasons why Petitioners challenged the scheme's (lack of) procedural due process protections. Further, Arkansas's lack of an articulated burden of proof standard makes it unconstitutional according to court decisions from Massachusetts, Wyoming, New York, and the Third Circuit. Yet the Eighth Circuit has upheld the scheme. This Court should resolve this conflict.

ARGUMENT

I. Respondents' attempts to minimize the procedural deficiencies fail.

Petitioners' Certiorari Brief identified significant procedural deficiencies in the risk assessments, including: no right to view all the evidence considered against the offender; no right to confront witnesses; no right to see all the documentary

evidence; the prohibition of counsel at the interview; no right to call witnesses on the offender's behalf; and very limited judicial review of the assessment. *See* Petitioners' Certiorari Brief at pp. 4-6.

The Respondents attempt to minimize these deficiencies, and in their attempt make two incorrect claims.

A. Arkansas's risk assessment scheme affirmatively bars counsel from the interview.

Respondents claim that Petitioners "may be represented by counsel" as part of their initial risk assessment. In support of that averment, Respondents cite to Ark. Code Ann. § 12-12-918(a)(2)(B) and the Guidelines, reproduced at page 8a in the Respondents' Brief. *See* Respondents' Brief at 13.

Respondents' averment is incorrect. The Eighth Circuit held that sex offenders could not have counsel present in the risk assessment interviews. *See* the Eighth Circuit opinion, reproduced at Petitioners' Brief in Support of Certiorari at page 16a. The Respondents admitted the same: "It is the examiners' general practice not to allow counsel to accompany sex offenders during the assessment interview." Respondents' Brief at 14. The citations offered by the Respondents, Ark. Code Ann. § 12-12-918(a)(2)(B) and the Guidelines, are not to the contrary. Section 12-12-918 applies only to Level 4 offenders; the Guidelines do not give an offender the right to bring his lawyer to the interview.

Indeed, the Arkansas risk assessment scheme effectively punishes a sex offender for injecting a lawyer into the process. Both the Respondents and the Eighth Circuit believe that an offender having a lawyer at the interview is a bad thing. It would "entail rather significant fiscal and

administrative burdens." Respondents' Brief at 17; Eighth Circuit opinion, reproduced at Petitioners' Brief in Support of Certiorari at page 17a. And if an offender is deemed to be not as forthcoming as the interviewer would like (for example, by burdening the interviewer with the presence of a lawyer), then the offender would receive a higher risk determination. *See* Guidelines, reproduced in Respondents' Brief at 23a.

B. Respondents' intimation that Petitioners can obtain all the documentary evidence against them is incorrect.

Respondents intimate that Petitioners can review and challenge the documents being used against them in the risk assessments. Respondents' Brief at 13-15. Such an intimation is incorrect. There is no right to the documents obtained from third parties, but only a list of the documents. Ark. Code Ann. § 12-12-917(d)(2)(B)(i)-(ii). The Freedom of Information Act does not apply to risk assessments. *See* Guidelines, reproduced at page 55a of the Respondents' Brief. Accordingly, there is no way for an offender to compel document production. And even if records are produced, the witnesses' identities will be redacted. *See* Guidelines, reproduced at page 55a of the Respondents' Brief.

Thus, if an interviewer were to receive a letter generated by the offender's neighbor, the offender has no right to see the contents of the letter, nor even know the neighbor's identity.

At the interview, an offender could be questioned about allegations in the neighbor's letter. "If the answers do not match up with the documents previously obtained, the interviewer may conclude that the individual is withholding information or being deceptive." Guidelines, reproduced at

Respondents' Brief at 23a. That could result in the offender being assigned a higher risk determination. *Id.*

In other words, a sex offender can receive a higher risk determination if his answers conflict with the interviewer's secret evidence.

II. Respondents' attempt to distinguish other states' procedures proves that there is a split of authority on minimum procedural protections due.

Respondents contend that the various, conflicting decisions regarding procedural due process "do not reflect any disagreement on the operative legal standards." Respondents' Brief at 15.

Respondents' argument misplaces the focus of Petitioners' question. The split of authority is not in the operative procedures adopted by each state; it is in the various holdings regarding the minimally required constitutional procedural due process.

The Eighth Circuit's holding differs from other jurisdictions. It has reached a different conclusion as to what is or is not the minimally required constitutional procedural due process in sex offender risk assessments. Decisions from Massachusetts, New York, New Jersey, Oregon, Wyoming, and the Third Circuit find constitutionally-based safeguards that differ from one another and differ from the Eighth Circuit. *See* cases discussed at pages 9-12 of the Petitioners' Certiorari Brief.

Indeed, the fact that there are so many differing states with so many differing judicial, as well as legislative, standards simply proves the point that there is no settled

holding as to the minimally required constitutional procedural due process in risk assessments.

III. Respondents' allegation that Petitioners failed to raise burden of proof before the Eighth Circuit misses the point.

In their final argument, the Respondents claim that the Petitioners raise the burden of proof issue for the first time in their Certiorari Brief. Respondents' Brief at 21.

The Respondents miss the point. The Petitioners, from the very start, have challenged the procedural due process of Arkansas's risk assessment procedure. As noted by the Eighth Circuit, the Petitioners "complain primarily that the procedures do not afford the 'rigors of an adversarial process.'" Eighth Circuit opinion, reproduced at Petitioners' Brief in Support of Certiorari at page 16a.

The "burden of proof" question serves two purposes in the Petition for Certiorari. First, it highlights the split of authority among the States and Circuits as to the minimally required constitutional procedural due process standards in risk assessments. Massachusetts and Wyoming have established a constitutional "burden of proof" minimum that conflicts with holdings in the Third Circuit and New York. *See* Petitioners' Certiorari Petition at 11. And those four jurisdictions are in conflict with the Eighth Circuit, which has upheld a risk assessment scheme that has no burden of proof standard whatsoever.

Second, Arkansas's lack of an articulated burden of proof standard reveals another serious procedural flaw. If not even a "preponderance" standard is required, then is any level of proof required? Could the assessment committee ignore nine

favorable letters from law enforcement officers, psychiatrists, and employers, and instead assign a high risk determination solely on the basis of a single (and undisclosed) letter from a disgruntled neighbor? Presumably yes, because the Arkansas scheme has no burden of proof at all. This is another reason why Petitioners "complain primarily that the procedures do not afford the 'rigors of an adversarial process.'"

CONCLUSION

The Eighth Circuit has upheld a risk assessment scheme that lacks procedural protections that other courts have held are constitutionally mandated. This Court should grant certiorari and resolve the conflict.

Respectfully Submitted,

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